

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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WINDWARD BORA LLC, :
:
Plaintiff, : 19-CV-4601 (RRM) (JO)
:
February 19, 2020
:
V. : Brooklyn, New York
:
VADIM BORODYANSKY, et al., :
:
Defendant. :
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TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE JAMES ORENSTEIN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: RAFI HASBANI, ESQ.

For the Defendant: CHRISTOPHER VILLANTI, ESQ.

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1 THE CLERK: Welcome, everybody. We're on
2 the record in Windward Bora v. Borodyansky, 19-CV-4601.

3 Counsel, state your appearances please. For
4 the plaintiff?

5 MR. HASBANI: Rafi Hasbani from Hasbani &
6 Light, attorneys for the plaintiff.

7 MR. VILLANTI: Christopher Villanti of
8 Petroff Amshem for the defendants Borodyansky and
9 Rytova.

10 THE COURT: Good morning, everybody.

11 MR. HASBANI: Good morning.

12 MR. VILLANTI: Good morning, your Honor.

13 THE COURT: All right, folks, so -- Mr.
14 Villanti, your client still hasn't provided the
15 acceleration letter?

16 MR. VILLANTI: They did find an acceleration
17 letter, which was provided. It turns out, at least
18 what we have, what he was able to find was, it was
19 later than he thought and it's within six years, but he
20 did find an acceleration letter around that time.

21 THE COURT: Okay. Are you withdrawing the
22 counterclaim?

23 MR. VILLANTI: We wanted to -- the reason
24 why we asked partially also for the subpoena on PNC was
25 just to get -- there are two letters that are exactly

1 the same like this, not only the one in 2013 but there
2 was another one sent in 2016. So with that, it's
3 possible obviously that there was one sent within two
4 months earlier, which wouldn't create the SOL issue
5 but --

6 THE COURT: Based on your reasonable
7 inquiry, do you know that there is such a letter?

8 MR. VILLANTI: I don't know. No, I don't
9 know for sure.

10 THE COURT: How can you maintain the
11 counterclaim consistent with Rule 11?

12 MR. VILLANTI: Given what we have right now,
13 we can't. I would admit it.

14 THE COURT: You're withdrawing it? Look,
15 you know what the ethical rules are and you know what
16 Rule 11 says. Are you ethically in a position to
17 maintain this counterclaim?

18 MR. VILLANTI: I think -- I would submit
19 that we --

20 THE COURT: Please answer my question.

21 MR. VILLANTI: Yes. Given what we have, I
22 can't maintain it. I freely admit that.

23 THE COURT: So why not withdraw it? If it's
24 an ethical violation and a violation of Rule 11 to
25 maintain it, why not withdraw it?

1 MR. VILLANTI: I don't believe it's --

2 THE COURT: Unless you want me to take the
3 steps are appropriate when somebody violates Rule 11
4 and their ethical obligations. I don't want to do
5 that.

6 MR. VILLANTI: No, and I don't -- I'm not
7 trying to put your Honor in any kind of position to do
8 that.

9 THE COURT: Well then, do what's right.
10 Look, you can't -- you know you can't have it both
11 ways, right?

12 MR. VILLANTI: Yes.

13 THE COURT: Okay, so I will leave it to you
14 to take appropriate steps given the fact -- given your
15 candid admission, which I appreciate --

16 MR. VILLANTI: Yes.

17 THE COURT: -- that you are not in a
18 position ethically or consistent with Rule 11 to
19 maintain the counterclaim.

20 MR. VILLANTI: Yes, your Honor.

21 THE COURT: Mr. Hasbani.

22 MR. HASBANI: Yes, your Honor.

23 THE COURT: The payment history and other
24 documents that they want to subpoena are things that
25 are within your legal right to get from these other

1 parties, correct?

2 MR. HASBANI: Correct, and we are --

3 THE COURT: Have you gotten them?

4 MR. HASBANI: Not yet.

5 THE COURT: You have violated your
6 obligations to provide the discovery because it's not
7 just what's in your possession, it's possession,
8 custody, and control, and these are within your
9 control, correct?

10 MR. HASBANI: They are not in our control.

11 THE COURT: You have a legal right to get
12 them from these folks, right?

13 MR. HASBANI: Correct.

14 THE COURT: You can issue a subpoena to
15 them, as I discussed with you last time, and enforce it
16 if they don't comply, correct?

17 MR. HASBANI: I was advised by them that
18 they would provide these documents without the
19 subpoena.

20 THE COURT: You have a legal obligation to
21 provide them because they're within you're legal
22 control, correct?

23 MR. HASBANI: Correct.

24 THE COURT: You have failed to do that,
25 correct?

1 MR. HASBANI: Correct.

2 THE COURT: Any reason why I shouldn't
3 preclude you from establishing the matters to which
4 they are relevant, namely the payment history and the
5 purported failure to pay on the loan?

6 MR. HASBANI: Your Honor, I mean, as the
7 case law provided in my letter, we can rely on their
8 records with regard to payoff amount.

9 THE COURT: Yes, but what you can't do is
10 deny them discovery to show that your records are
11 incorrect. And if you fail to provide them discovery,
12 you can be precluded under Rule 37, as I warned would
13 be the case. You can be precluded -- one of the
14 sanctions under Rule 37 that I advised I would
15 consider, one of those sanctions is to preclude you
16 from establishing something as to which you've denied
17 discovery, right?

18 MR. HASBANI: Correct.

19 THE COURT: Any reason I shouldn't do that?

20 MR. HASBANI: Because we've taken the
21 necessary steps to obtain these documents and there's
22 been a delay --

23 THE COURT: Did you send them a subpoena?

24 MR. HASBANI: I believe so.

25 THE COURT: To the companies?

1 MR. HASBANI: Yes.

2 THE COURT: Have you enforced it?

3 MR. HASBANI: Not yet.

4 THE COURT: Well, then you haven't --

5 MR. HASBANI: We've sent --

6 THE COURT: You haven't done the things that
7 are necessary. Look, you have an obligation --

8 MR. HASBANI: We've issued --

9 THE COURT: Excuse me, excuse me.

10 MR. HASBANI: May I just finish?

11 THE COURT: I'm sorry. You had an
12 obligation, as we discussed the last time we were
13 here --

14 MR. HASBANI: Yes.

15 THE COURT: -- a month ago. You had an
16 obligation to provide these documents in discovery,
17 correct?

18 MR. HASBANI: You have failed in that
19 obligation, correct?

20 MR. HASBANI: Correct.

21 THE COURT: I gave you a deadline for
22 compliance and warned you of sanctions under Rule 37 if
23 you failed to comply, correct?

24 MR. HASBANI: Correct.

25 THE COURT: Why shouldn't I therefore, given

1 that you had the ability to enforce your subpoena,
2 given that you failed to discharge your obligation to
3 do so, and given that were you on notice of the
4 potential consequences, why shouldn't I preclude you?

5 MR. HASBANI: I believe I was required to
6 give them thirty days to comply with the subpoena and
7 we were here less than thirty days ago.

8 THE COURT: But less than thirty days ago
9 was well after you were supposed to provide the
10 discovery, correct?

11 MR. HASBANI: Correct.

12 THE COURT: All right. I'm going to impose
13 that sanction.

14 Anything else for today, folks?

15 MR. VILLANTI: I don't think so, your Honor.

16 THE COURT: Okay, have a good day.

17 MR. HASBANI: Thank you.

18 MR. VILLANTI: Thank you.

19 THE COURT: I'm sorry, are we still on the
20 record?

21 THE CLERK: Yes.

22 THE COURT: Are you able to maintain the
23 lawsuit if you can't prove the payment history?

24 MR. HASBANI: I believe so.

25 THE COURT: How?

1 MR. HASBANI: I have a note mortgage and
2 they've admitted to default.

3 THE COURT: No, you're precluded from
4 introducing that because it's the subject matter I'm
5 precluding.

6 MR. HASBANI: Actually, the note, the
7 mortgage, and the proof of default have been already
8 introduced.

9 THE COURT: When you say introduced, not in
10 evidence.

11 MR. HASBANI: They've been provided to
12 counsel.

13 THE COURT: Not in evidence. You haven't
14 had a trial yet.

15 MR. HASBANI: Correct.

16 THE COURT: You are precluded from entering
17 them in evidence at trial.

18 MR. HASBANI: But those documents were
19 already provided in discovery.

20 THE COURT: Yes, I know, but it's the
21 subject --

22 MR. HASBANI: Why would I be precluded --

23 THE COURT: Why?

24 MR. HASBANI: Why would I be precluded
25 from --

1 THE COURT: Look, I don't -- I don't want to
2 think that you are being wilfully obtuse but it looks
3 that way. I have precluded the subject matter, not the
4 evidence that you failed to get, because that would
5 only have the potential for undermining your claim and
6 I understand why you don't want to provide it.

7 MR. HASBANI: There's --

8 THE COURT: What you're precluded on is the
9 subject matter of their payment history, their failure
10 to pay. How can you maintain your claim if you cannot
11 prove their failure to pay?

12 MR. HASBANI: They admitted it.

13 THE COURT: How? I've precluded the subject
14 matter.

15 MR. HASBANI: I understand but they've
16 admitted it in their state action.

17 THE COURT: If you're saying that you think
18 you've got a path forward, I will recommend dismissal.
19 Have a good day.

20 MR. HASBANI: Your Honor, they've admitted
21 it in their state action.

22 THE COURT: Have a good day. You have
23 wilfully failed to do what you are required to do in
24 discovery and made it impossible for them to get a fair
25 trial on your claim.

1 MR. HASBANI: I respectfully disagree, your
2 Honor.

3 THE COURT: I know you do. Have a good day.

4 MR. HASBANI: Thank you?

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18 I certify that the foregoing is a correct
19 transcript from the electronic sound recording of the
20 proceedings in the above-entitled matter.
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25 ELIZABETH BARRON

February 20, 2020